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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 652

ANDREW KJAR AND KATHERINE D. KJAR,[1]
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 59-64) is reported in 177 F. 2d 630.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1949. (R. 64.) A petition

[1] The petition for certiorari describes Mrs. Kjar as "now deceased."

for rehearing was denied on December 10, 1949. (R. 70.) The petition for certiorari was filed on March 6, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Where the taxpayers' complaint showed on its face that the issues raised had been finally decided adversely to taxpayers by the Court of Claims, whether the Court of Appeals erred in affirming the order of the District Court dismissing the complaint.

STATUTE AND RULES INVOLVED

28 U. S. C.:

> SEC. 2519. *Conclusiveness of judgment*
>
> A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 900. Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:
>
> "SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller

or importer when withdrawn, and collected under the provisions of existing law:

* * *

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

* * *"

Rules of Civil Procedure:

RULE 10. FORM OF PLEADINGS.

* * *

(b) PARAGRAPHS: SEPARATE STATEMENTS. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable

to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

* * *

RULE 12 [effective March 19, 1948]. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS.

* * *

(f) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

STATEMENT

The facts are set forth in the opinion of the Court of Appeals (R. 59-64) and in the earlier opinion of the Court of Claims (*Kjar* v. *United States,* 69 F. Supp. 406, certiorari denied, 332 U. S. 768).[2] The

[2] The difficulties involved in piecing together the pertinent facts of this litigation were described as follows in the opinion of the Court of Appeals (R. 60):

> Both in the Court of Claims and in the District Court, though the litigation involved many thousands of dollars,

taxpayers filed a petition with the Board of Tax Appeals (later the United States Tax Court) for a redetermination of income taxes for the years 1928 to 1932, involving gains from sales of distilled spirits. The Board determined that taxpayers had overpaid their income taxes by $16,025.59.[3] Refund checks were issued but not paid because of assessments which had been made in 1935 and 1939 for distilled spirits taxes in a much larger sum. To enforce collection of such assessments, the Collector in 1940 seized stocks and bonds of taxpayers in the hands of their brokers. After failure of an effort to compromise, taxpayers filed suit in the Court of Claims against the United States to recover the overpayments as found by the Board. The United States did not dispute the overpayments of income taxes but set up by way of counterclaim liability for distilled spirits taxes assessed under Section 900 of the Revenue Act of 1926, on the basis of $1.10 a gallon in the aggregate amount of $96,710.70. (R. 60-61.)

The opinion of the Court of Claims recited that the United States alleged in its counterclaim that taxpayers owed distilled spirits taxes at the rate of

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the Kjars had no lawyer, but Mr. Kjar acted throughout for himself and wife, as he has in this court, though admitting that he is not a member of the bar of any court, nor educated in law. The District Judge suggested, indeed insisted, that he get the assistance of a lawyer, but the suggestion was declined. This has resulted in great embarrassment in the District Court, and here, in trying to understand the contentions made and the relief sought.

[3] *Kjar* v. *Commissioner*, decided September 30, 1941 (1941 P-H B.T.A. Memorandum Decisions, par. 41,446).

$6.40 a gallon, on the theory that the distilled spirits involved had been diverted to beverage purposes, and also customs duties of $5 a gallon on the theory that the liquor was smuggled into the United States. The Court of Claims decided that, while the United States was not entitled to recover "beverage" taxes at the rate of $6.40 a gallon and the customs duties, it was entitled to recover so-called "non-beverage" taxes [4] on the basis of $1.10 a gallon as assessed. It thereupon rendered judgment in favor of the United States against the taxpayer, Andrew J. Kjar, for $100,685.11, plus interest, and dismissed taxpayers' petition. *Kjar* v. *United States,* 69 F. Supp. 406, 409, certiorari denied, 332 U. S. 768. Subsequently on a motion for a new trial, the Court of Claims in an unreported opinion on May 5, 1947, modified its decision, increasing the amount of the judgment against Andrew J. Kjar to $106,685.11, plus interest, and holding that Katherine D. Kjar was entitled to a refund of $6,000. *Kjar* v. *United States* (36 A. F. T. R. 1593).

After certiorari was denied, 332 U. S. 768, No. 232, Oct. Term 1947, taxpayers filed the present suit against the United States (R. 1-7) in the District Court for the Southern District of Georgia,

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[4] The terms "beverage tax" and "non-beverage tax" are explainable by the terms of Section 900 of the Revenue Act of 1926, which amended Section 600 (a) (3) and (4) of the Revenue Act of 1918, *supra,* p. 3, to impose the tax at the rate of $6.40 a gallon on distilled spirits diverted to beverage purposes and at the rate of $1.10 a gallon on such spirits not so diverted.

seeking to cancel the judgment rendered by the Court of Claims in favor of the United States against taxpayer Andrew J. Kjar.

The complaint alleged, *inter alia,* that the Commissioner had wrongfully sold property valued at more than $100,000 for only a fraction of its value and had kept the proceeds; that the Commissioner of the Court of Claims knowingly accepted perjured testimony by a Government official; that such Commissioner filed a false report showing that certain assessments were unsatisfied, while in fact they had been cancelled (R. 1-2); that taxpayers filed exceptions to the Commissioner's report but the court destroyed the exceptions and stated that they were not filed; that the counterclaim of the Government was based on assessments on the strength of manufactured false invoices (R. 3); that the taxpayers appealed to this Court but the appeal was premature because it was not discovered at that time that the Court of Claims had destroyed taxpayers' records; that the large non-beverage tax which they were denied the right to defend against was "invented" by four judges of the Court of Claims (R. 4-5); that the taxes were unconstitutional and in fact not on the statute books (R. 4); and that the judgment was "perputated [sic] by fraud, perjury, and at the cost of destroying or misplacing our Records in Court of Claims" (R. 5). Taxpayers prayed that the judgment entered by the Court of Claims be cancelled and that they have

judgment against the United States for $350,000 in damages for money, property, and stocks illegally taken and for mental strain and sickness. (R. 5-7.)

After hearing argument (R. 17-37), the District Court, sustaining the Government's motion, dismissed the complaint in its entirety (R. 37-38). Upon taxpayers' appeal (R. 39) the order of dismissal was affirmed by the Court of Appeals (R. 59-64).

ARGUMENT

The ruling below is clearly correct; the issues raised relate only to the particular facts of this litigation; and no conflict of decisions is presented.

1. The Court of Appeals correctly affirmed the order of the District Court dismissing the taxpayers' complaint. The complaint disclosed on its face that taxpayers were seeking only to relitigate taxpayer Andrew Kjar's liability for the distilled spirits taxes which had already been determined by the final judgment of the Court of Claims. Section 2519, 28 U.S.C., *supra*, p. 2, provides that a final judgment of the Court of Claims is conclusive against a plaintiff and shall forever bar any further claim, suit or demand against the United States arising out of the matters involved in the case or controversy. Moreover, under familiar principles of *res judicata*, the former final judgment of the Court of Claims is a complete bar to this suit. *Commissioner* v. *Sunnen*, 333 U. S. 591; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620; see *Parker Bros.* v. *Fagan*, 68 F. 2d 616 (C.A. 5th), certiorari

denied, 292 U.S. 638; *Kelly* v. *United States,* 90 F. 2d 73 (C.A. 3d), reversed on other grounds, 300 U.S. 50. As the court below held (R. 63), if taxpayers could show that fraud, perjury, or other misconduct underlay the judgment of the Court of Claims, their remedy would have been to apply to the Court of Claims for correction, rather than to attack the judgment collaterally in another court.

2. Taxpayers were not denied any constitutional right in not receiving a jury trial. Their complaint did not state a cause of action triable in the District Court, and no issue of fact to be resolved by a jury was presented. Moreover, the right to trial by jury is expressly withheld by 28 U.S.C., Section 2402, in actions against the United States in the District Courts under 28 U.S.C., Section 1346, the jurisdictional provision under which this suit was brought.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APRIL, 1950.

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